judicial notice. It also supports the lower court on the proposition that a fact judicially noticed is conclusively presumed to be true, and all evidence to rebut it should be rejected. The two quotations from CYC. cited in the dissenting opinion as supporting this proposition, are hardly in point. That "Uncontroverted evidence, produced to establish a fact, does not preclude the court from finding the fact to be otherwise, by resorting to judicial knowledge" (16 CYC. 852), merely means that a court may take judicial notice of a fact, in spite of the evidence and does not mean that all evidence, in denial of a fact judicially noticed, should be rejected. The other quotation that, "Judicial knowledge is not reached by the use of evidence; it is a matter pertaining to the judicial function, and its existence, like that of an admission, stipulation or rule of presumption, dispenses with evidence as to the point covered" (16 CYC. 850), especially when taken in connection with the cases cited in support of it, is but a statement of the rule that a party who has a fact judicially noticed, need not introduce evidence to support it. *Ex parte Kair,* 28 Nev. 127, seems to go pretty far toward holding that a fact judicially noticed cannot be rebutted. It laid down the rule that, in an action based on a statute, which imposed a penalty on anyone working more than eight hours a day in certain injurious employments, the court would take judicial notice of the fact that the defendant's employment was injurious and would exclude all evidence, tending to show the contrary. Any other rule, in such cases as this, the court says, would nullify the purpose of the legislature.

EVIDENCE—RELATIVE VALUE OF POSITIVE AND NEGATIVE TESTIMONY AS TO EXISTENCE OF HEADLIGHT ON LOCOMOTIVE.—The plaintiff's husband was killed, at a public crossing, by one of the defendant's trains. Positive evidence was given, on behalf of the defendant, that the engine carried a headlight. Other witnesses testified that they did not see a headlight. The defendant contends that the lower court erred in submitting the question, as to whether or not the train carried a headlight, to the jury, claiming that one who testifies negatively does not raise a conflict of evidence, as against one who testifies positively. *Held,* that the question was properly submitted to the jury. *Fleenor* v. *Oregon Short Line R. Co.* (1909), — Idaho —, 102 Pac. 897.

Between witnesses of equal credibility, the testimony of those who swear positively, is entitled to greater weight than the testimony of those who swear negatively. 9 ENCYC. OF EVID., 867; *White* v. *Wilimngton City Ry. Co.* (Del.), 63 Atl. 931; *The Alabama,* 114 Fed. 214; *Grabill* v. *Ren,* 110 Ill. App. 587; *Chi. & E. I. R. Co.* v. *Eganolf,* 112 Ill. App. 323; *Northern Cent. Ry. Co.* v. *State,* 100 Md. 404. This does not mean that negative testimony should be rejected, in case there is positive testimony going to the same point. *Chi. & N. W. Ry. Co.* v. *Andrews,* 130 Fed. 65; *Northern Cent. Ry. Co.* v. *State,* supra; *Le Cointe* v. *U. S.,* 7 App. D. C. 16; *Muscott* v. *Stubbs,* 24 Kan. 520; *Selensky* v. *Chi. Great Western Ry. Co.,* 120 Iowa 113; *Ehrman* v. *Nassau Electric R. Co.,* 48 N. Y. Supp. 379. The general rule giving preference to positive over negative testimony, does not apply however to those cases in which the person who testifies negatively was in as good a position to wit-

ness the happening of the event or the existence of the fact, as those who testify positively. This apparent exception to the general rule was applied in the following cases, where the existence of a headlight, the ringing of the locomotive's bell or the sounding of its whistle, was in question. *Killian* v. *Ga. R. R. & Banking Co.*, 97 Ga. 727; *Stanley* v. *Cedar Rapids & M. C. Ry. Co.*, 119 Iowa 526; *State ex rel. Essex* v. *Kansas City, Fort S. & M. Ry. Co.*, 70 Mo. App. 634; *Cleveland, C. C. & St. L. Ry. Co.* v. *Richardson*, 19 Ohio Cir. Ct. R. 385; *Haun* v. *Rio Grande, W. Ry. Co.*, 22 Utah 346. Some courts go so far as to hold that testimony, to the effect that an event did not happen or that a fact did not exist, is not negative, if the witness giving it was in as advantageous a position to see and hear, as those who testify that it did happen or exist. *Grabill* v. *Ren*, supra; *Chi. Consol. Traction Co.* v. *Gervens*, 113 Ill. App. 275; *Lonis* v. *Lake Shore & M. S. Ry. Co.*, 111 Mich. 458; *Cleveland, C., C. & St. L. Ry. Co.* v. *Richardson*, supra; *Cox* v. *Schuylkill Valley Traction Co.*, 214 Pa. St. 223.

GARNISHMENT—EFFECT OF APPEARANCE OF GARNISHEE.—In garnishment proceedings, the return of the sheriff of his only service in the case, did not state that the garnishee had been presented with a copy of the writ of garnishment as was required by statute. The garnishee appeared and answered. On appeal from an order discharging garnishee, *Held*, that the garnishee can not by voluntary appearance waive jurisdictional defects so as to confer jurisdiction over the *res*, but can only waive such defects as affect him personally, and hence could object to the failure to make proper service upon him at any time before the money was paid by him and applied to the judgment. *Bristol* v. *Brent* (*Atchison T. & S. F. Ry. Co., Garnishee*) (1909), — Utah —, 103 Pac. 1076.

The claim of the appellant is that the garnishee by its appearance and answer waived all defects in the service of the writ and thus conferred upon the court jurisdiction of the person and of the res, namely, the debt. Upon this question there is much dispute. Cases can be found in almost half of the states upholding the contention of the appellant. The appearance by attorney of a party summoned as a garnishee, cures any defect in the service of the writ of garnishment. *Mercer* v. *Booby*, 6 Fla. 723. Appearance and answer of a garnishee is a waiver of objections to the manner of garnishment summons. *Moody & Bigelow* v. *Alter Winston Co.*, 59 Tenn. 142. *Betancourt* v. *Eberlin*, 71 Ala. 461. *Schober* v. *Mather*, 49 Pa. St. 21. When a garnishee appears and answers interrogatories, neither he nor the principal defendant can be heard to complain of the insufficient service on the garnishee. *Lupton* v. *Moore*, 101 Pa. St. 318; *Nat. Bank of Com. of Chi.* v. *Titsworth*, 73 Ill. 591; *Wisecarver* v. *Braden*, 146 Pa. 42; *Carter* v. *Koshland*, 12 Or. 492; *Baltimore etc. R. R. Co.* v. *Taylor*, 81 Ind. 24. As is said by the court in the principal case, careful examination will reveal the fact that the courts, almost without exception, which extend the doctrine of waiver beyond the personal rights of the garnishee, do so upon the general principle, that a party by general appearance waives all defects in process and in the service thereof. Garnishment is a proceeding in rem. The res is the debt. It is